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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS HERNANDEZ,

Defendant and Appellant.

B212579

(Los Angeles County
Super. Ct. No. PA058099)

APPEAL from a judgment of the Superior Court of Los Angeles County. Burt Pines, Judge. Affirmed with directions.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant/Appellant Jose Luis Hernandez was convicted following a jury trial of two counts of premeditated attempted murder (counts 1 and 5; Pen. Code §§ 187, subd. (a), 664, subd. (a)), one count of assault on a peace officer with a semiautomatic firearm (count 2; Pen. Code § 245, subd. (d)(2)), two counts of possession of a firearm by a felon (counts 3 and 6; Pen. Code § 12021, subd. (a)(1)), and assault with a semiautomatic firearm (count 7; Pen. Code § 245, subd. (b)).¹ Appellant was found not guilty of count 8, another charge of assault on a peace officer with a semiautomatic firearm. The jury found true the allegations that Appellant personally used and intentionally discharged a firearm, causing great bodily injury, and that Appellant committed the charges in counts 1, 2, and 3 for the benefit of a criminal street gang. (Pen. Code §§ 186.22, subd. (b), 12022.5, subds. (a) & (d), 12022.53, subds. (b), (c) & (d).) The trial court sentenced Appellant to a total of 40 years to life on count 1. On count 5, the court imposed a consecutive sentence of life with the possibility of parole, plus a consecutive term of 25 years to life. The sentences on the remaining counts were either imposed and stayed or imposed and ordered to run concurrently.

Appellant contends that the evidence is insufficient to establish intent to kill and premeditation and deliberation to support his conviction on count 1, premeditated attempted murder. We disagree and will hold that the evidence is sufficient to sustain Appellant's conviction.

Appellant's second contention is that the abstract of judgment must be corrected to conform to the trial court's oral pronouncement of judgment. Respondent agrees that the abstract of judgment must be corrected. We therefore will direct the clerk of the trial court to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment. The judgment will be affirmed.

¹ The information did not contain a count 4.

BACKGROUND

I. Factual Background

A. December 2006 Shooting

On December 22, 2006, Adrian Santibanez was shot while standing on a street in Los Angeles. Police recovered a shell casing from the scene of the shooting. While lying on the ground after being shot, Santibanez told Chris Flores and Shawn Segura that Appellant had shot him. However, at Appellant's trial, Santibanez denied having ever seen Appellant before. Flores saw Appellant running from the scene of the shooting and identified Appellant's photograph to officers. Segura also identified Appellant's photograph to officers. At trial, Flores denied having told police that Santibanez identified Appellant as the shooter. Also at trial, both Flores and Segura denied having identified Appellant's photograph and denied ever seeing Appellant before. They both testified that a snitch could be assaulted or killed in prison.

Officer John Macchiarella investigated the shooting. On January 3, 2007, Macchiarella applied for and received an arrest warrant for Appellant and a search warrant for his residence. On January 4, 2007, Macchiarella and other officers executed the warrants at Appellant's residence, but Appellant was not home at the time. Macchiarella spoke with Appellant's mother and asked her to call the police when Appellant returned home.

B. January 2007 Shooting

On January 5, 2007, around 8:00 p.m., Appellant's mother placed two calls on her cell phone to 911, asking police to come to her residence. Officer Mark Wilbur,² his partner, Officer Ricardo Hernandez, and Officers Tamate and Hascher responded to the 911 call; Wilbur recognized the address as Appellant's residence.

² Wilbur was a sergeant at the time of trial, but he testified that he was an officer at the time of the incident.

Before entering the home, Wilbur explained to the other officers that Appellant was wanted for attempted murder and instructed Tamate and Hascher to stay in the yard in order to watch Appellant's bedroom windows. Appellant had given Wilbur his phone number several weeks before, so Wilbur called the number and heard the phone ringing in the house through an open door, but no one answered. Wilbur asked his partner to "call out 'Jose' in a Hispanic accent to see if maybe he believed it was one of his family members calling him and see if he would come out," but Appellant did not emerge from the house.

Officers Wilbur, Hernandez, and Hascher entered the home to search for Appellant "and/or victims." Wilbur was in the living room with his gun drawn when he heard a bedroom door being unlocked; Appellant stepped out of the bedroom, holding a pipe for either marijuana or methamphetamine in his right hand. Appellant looked at Wilbur. Wilbur called Appellant by the moniker that Wilbur knew and told Appellant to show Wilbur his hands, but Appellant turned and ran back into the bedroom. Wilbur did not see a weapon in Appellant's hand. Wilbur chased Appellant and kicked the bedroom door as Appellant tried to lock the door. The door hit Appellant, who was behind the door, and bounced back toward Wilbur.

When the door bounced back toward Wilbur, Wilbur put his left foot on the doorknob to try to push it open again. As Wilbur did so, he heard a gunshot from inside the room, saw a hole in the door, and felt a pain in his leg. Wilbur realized that he had been shot, so he returned fire. The bullet went through the front of Wilbur's leg and out the back of his leg, resulting in an injury that kept Wilbur out of work for three months.

Wilbur placed a call for help. Macchiarella and other officers responded to the call. After calling for help, Wilbur heard the sound of blinds being ripped from the window in the bedroom and a screen being torn off the window. Wilbur ordered Officer Tamate to go outside to cover the window. Wilbur went outside and saw Appellant lying on the ground, with Officers Tamate and Hascher giving him instructions to stay down.

Other officers finished clearing the house because the telephone call indicated that an additional suspect had been in the house. Wilbur asked Appellant who else was in the bedroom, and Appellant told him it was “his homeboy Mono,” whom Wilbur knew to be Alfonso Estrada Villegas. Wilbur called Villegas through the window, and Villegas emerged from under the bed.

Two guns were found in the bathroom adjoining the bedroom; one handgun was in the shower stall, and the second was in the toilet. The 9-millimeter gun in the shower stall had one live round in the chamber, and the magazine was empty. The .25-caliber gun found in the toilet was found with five live cartridges inside the magazine. An expended casing from the 9-millimeter gun was found in the bedroom. Appellant’s DNA was found on the handle of the 9-millimeter gun.

Appellant was interviewed by Detective Luis Alarcon on January 7, 2007. Appellant initially denied having shot Wilbur, but he subsequently told Alarcon that he had fired once.

II. Procedural Background

Appellant was charged by information with the following: (1) count 1, attempted willful, deliberate and premeditated murder of Wilbur (Pen. Code §§ 187, subd. (a), 664, subd. (a)); (2) count 2, assault on a peace officer, Wilbur, with a semiautomatic firearm (Pen. Code § 245, subd. (d)(2)), with the allegation that Appellant personally used a firearm (Pen. Code, §§ 12022.53, subd. (b), 12022.5, subds. (a) & (d)); (3) count 3, possession of a firearm by a felon (Pen. Code § 12021, subd. (a)(1)); (4) count 5, attempted willful, deliberate and premeditated murder of Santibanez (Pen. Code §§ 187, subd. (a), 664, subd. (a)); (5) count 6, possession of a firearm by a felon (Pen. Code § 12021, subd. (a)(1)); (6) count 7, assault on Santibanez with a semiautomatic firearm (Pen. Code § 245, subd. (b)); (7) count 8, assault on a peace officer, Hernandez, with a semiautomatic firearm (Pen. Code § 245, subd. (d)(2)).³ The information further alleged that, as to counts 1, 2, and 8, Appellant personally and intentionally discharged a firearm,

³ As noted above, the information did not contain a Count 4.

causing great bodily injury to Wilbur. (Pen. Code, § 12022.53, subd. (d).) The information also alleged that, as to count 5, Appellant personally and intentionally discharged a firearm, causing great bodily injury to Santibanez. (Pen. Code, § 12022.53, subd. (d).) The information also contained allegations as to counts 1, 2, 5, and 8 that Appellant used and personally and intentionally discharged a firearm. (Pen. Code, § 12022.53, subds. (b) & (c).) The information alleged as to counts 1, 2, 3, and 8 that the offenses were committed for the benefit of a criminal street gang, causing the offenses to become serious felonies. (Pen. Code, §§ 186.22, 1192.7, subd. (c)(8).)

Appellant entered not guilty pleas, and a jury trial commenced in October 2008. The jury found Appellant guilty of counts 1, 2, 3, 5, 6, and 7, and found all the allegations true, but found Appellant not guilty of count 8. As to counts 1 and 5, the attempted murder charges, the jury found true the allegations that the attempted murders were committed willfully, deliberately and with premeditation.

The trial court sentenced Appellant on count 1 to a term of 15 years to life, with an additional and consecutive term of 25 years to life for personally and intentionally discharging a firearm and causing great bodily injury, pursuant to Penal Code section 12022.53, subdivision (d), for an aggregate term of 40 years to life. The court then sentenced Appellant to an additional and consecutive term of 20 years for personally and intentionally discharging a firearm, pursuant to Penal Code section 12022.53, subdivision (c), but the court stayed the sentence pursuant to Penal Code section 12022.53, subdivision (f). The court sentenced Appellant to a consecutive term of 10 years for personally using a firearm, pursuant to Penal Code section 12022.53, subdivision (b), but stayed that sentence as well.

As to count 2, assault with a semiautomatic firearm on a police officer, the court sentenced Appellant to a term of nine years, plus a consecutive term of 25 years to life, pursuant to Penal Code section 12022.53, subdivision (d). The court then imposed a consecutive term of 20 years, pursuant to Penal Code section 12022.53, subdivision (c), which the court then stayed, pursuant to Penal Code section 12022.53, subdivision (f).

The court imposed a consecutive term of 10 years, pursuant to Penal Code section 12022.53, subdivision (b), but stayed this sentence pursuant to Penal Code section 12022.53, subdivision (f). The court then sentenced Appellant to a consecutive term of 10 years, pursuant to Penal Code section 186.22, subdivision (b)(1)(C). Count 2 therefore carried an aggregate term of 44 years to life, but the court stayed the entire sentence on count 2, pursuant to Penal Code section 654, stating that “the crimes in count 1 and count 2 had the same intent and objective.”

As to count 3, possession of a firearm by a felon, the court sentenced Appellant to a term of three years, to run concurrently with the sentence on count 1. As to count 5, attempted murder, the court sentenced Appellant to a term of life with the possibility of parole, plus a consecutive term of 25 years to life for the gun allegation (Pen. Code, § 12022.53, subd. (d)), both to run consecutively to the sentence on count 1. The court imposed and stayed sentences as to the gun use allegations on count 5. As to count 6, possession of a firearm by a felon, the court imposed a three-year term to run concurrently with the other sentences. As to count 7, assault with a semiautomatic firearm, the court imposed a nine-year term, plus a four-year term for the personal use of a firearm, for an aggregate term of 13 years, which the court stayed.

The minute order accurately reflected the trial court’s oral pronouncement of judgment. However, the abstract of judgment does not reflect that the trial court stayed the sentence on count 2. Appellant filed a notice of appeal.

DISCUSSION

Appellant challenges the sufficiency of the evidence to sustain his conviction for premeditated attempted murder. He also contends that the abstract of judgment should be corrected.

I. Sufficiency of the Evidence

In reviewing a challenge to the sufficiency of the evidence, “the reviewing court’s task is to determine whether, in light of the whole record viewed in the light most

favorable to the prosecution, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt.” (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1624.) We ““must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” [Citations.]” (*People v. Smith* (2005) 37 Cal.4th 733, 739.) “The credibility of witnesses and the weight accorded the evidence are matters within the province of the trier of fact. [Citations.]” (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207.) ““An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise. [Citation.]’ [Citation.]” (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) “Reversal on this ground is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

““[A]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.’ [Citations.]” (*People v. Smith, supra*, 37 Cal.4th at p. 739.) The defendant must have either desired to cause a death or must have known to a substantial certainty that death would result. (*Ibid.*) Intent to kill may be “inferred from the defendant’s acts and the circumstances of the crime. [Citation.] ‘There is rarely direct evidence of a defendant’s intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant’s actions. [Citation.] The act of firing toward a victim at a close, but not point blank, range “in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill” [Citation.]’ [Citations.]” (*Id.* at p. 741.)

In *People v. Anderson* (1968) 70 Cal.2d 15, the California Supreme Court described three categories of evidence that are sufficient to sustain a finding of premeditation and deliberation: (1) prior planning activity, (2) motive, and (3) the nature of the killing. (*Id.* at pp. 26-27.) However, “[t]his framework does not establish an exhaustive list of required evidence which excludes all other types and combinations of

evidence that may support a jury's finding of premeditation [citation], nor does it require that all three elements must be present to affirm a jury's conclusion that premeditated murder was intended. [Citations.]" (*People v. Felix, supra*, 172 Cal.App.4th at p. 1626; see also *People v. Halvorsen, supra*, 42 Cal.4th at p. 421 [the guidelines of *People v. Anderson*, "are descriptive and neither normative nor exhaustive, and that reviewing courts need not accord them any particular weight".])

Appellant contends that the circumstances of the shooting do not support the jury's finding that he intended to kill Wilbur when he shot. We disagree. Appellant looked at Wilbur before running back into the bedroom. Appellant knew that Wilbur was on the other side of the door because Wilbur kicked the door open while Appellant tried to lock it, hitting Appellant with the door. After the door bounced back toward Appellant, Wilbur tried to push the door open again. Appellant then shot through the door, hitting Wilbur in the leg. Appellant thus fired directly at the door from close, if not point blank range, knowing that Wilbur was on the other side of the door. These circumstances alone are sufficient to support an inference of intent to kill. (*People v. Smith, supra*, 37 Cal.4th at p. 741.)

The circumstances also support the jury's finding that the attempted murder was willful, deliberate and premeditated. (See *People v. Ramos, supra*, 121 Cal.App.4th at p. 1208 [jury could rely on same factors indicating intent to kill to also conclude the attempted murder was willful, deliberate and premeditated].) "'The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .'" [Citations.]" (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224.) Wilbur testified that Appellant did not have a weapon in his hand when Appellant first emerged from the bedroom. Appellant ignored Wilbur's instruction to show Wilbur his hands and instead ran into the bedroom, where Appellant picked up a loaded weapon and shot through the bedroom door, knowing that Wilbur was on the other side of the door.

Appellant's actions are sufficient to support the jury's finding that Appellant acted willfully, deliberately, and with premeditation.

In *People v. Perez* (1992) 2 Cal.4th 1117, the California Supreme Court found the evidence sufficient to support a finding of premeditation and deliberation, stating that, as motive evidence, it was "reasonable to infer that defendant determined it was necessary to kill [the victim] to prevent her from identifying him." (*Id.* at p. 1126.) Here, it is reasonable to infer that Appellant knew that Wilbur was there to arrest him for the shooting of Santibanez and that his motive for the shooting was to avoid being arrested.

Regardless of whether Appellant aimed too low or the angle of the shot, the fact remains that, after ignoring Wilbur's instructions, Appellant ran back into the bedroom and attempted to close the bedroom door. After Wilbur pushed the door open, Appellant shot from close range directly through the door, knowing that Wilbur was on the other side of the door. Viewing, as we must, the evidence in the light most favorable to the prosecution, we conclude that the evidence is sufficient to sustain Appellant's conviction for attempted murder. (*People v. Smith, supra*, 37 Cal.4th at p. 739.)

II. Abstract of Judgment

Appellant contends that the abstract of judgment must be amended in order to reflect the trial court's oral pronouncement of judgment as to his sentence on count 2. Respondent agrees with Appellant.

"Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3.) The appellate court has the inherent power to "order[] correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts. [Citations.]" (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

At sentencing, the trial court sentenced Appellant on count 2, assault with a semiautomatic firearm on a police officer, to a term of nine years, plus a consecutive term of 25 years to life for intentionally discharging a firearm, causing great bodily injury, but

the court stayed the entire sentence. The court then imposed a consecutive term of 20 years for intentional discharge of a firearm and a consecutive term of 10 years for use of a firearm, but the court stayed both these sentences pursuant to Penal Code section 12022.53, subdivision (f). The court then sentenced Appellant to a consecutive term of 10 years, pursuant to Penal Code section 186.22, subdivision (b)(1)(C). Count 2 therefore carried an aggregate term of 44 years to life, but the court stayed the entire sentence, pursuant to Penal Code section 654, stating that “the crimes in Count 1 and Count 2 had the same intent and objective.”

The abstract of judgment does not indicate that Appellant’s sentence on count 2 was stayed. The 44-year aggregate term is listed on the first page of the abstract, with no indication that it was stayed. On the second page of the abstract, the nine-year term does not have an “x” in the box to indicate that this sentence was stayed pursuant to Penal Code section 654. The abstract of judgment accordingly must be corrected.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation a corrected abstract of judgment, reflecting that sentence on count 2 was stayed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.